Supreme Court, U.S.
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No. 97-801

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

YANKEE ATOMIC ELECTRIC COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The parent companies of Petitioner Yankee Atomic Electric Company are:

New England Power Company
The Connecticut Light and Power Company
Boston Edison Company
Central Maine Power Company
Public Service Company of New Hampshire
Western Massachusetts Electric Company
Montaup Electric Company
Central Vermont Public Service Corporation
Commonwealth Electric Company
Cambridge Electric Light Company

Petitioner has no subsidiaries.

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Strikingly, the government in its opposition brief does not even attempt to defend the fundamental rule of law applied by the Federal Circuit panel majority. The government does not claim that a statute falling predominantly (at least 85%) on the government's contracting partners *should* properly be considered a "public and general" law that—under the "sovereign acts" doctrine—exonerates the government from contract liability. Instead, the government urges the Court to avoid reviewing the important questions presented in this case for a variety of reasons unrelated to the Federal Circuit's extraordinary holding.

None of the government's arguments has merit, and they all are essentially beside the point. As the government implicitly acknowledges by its silence on the issue, the basic rule of law applied by the court below is completely indefensible—a statute that targets and hits the overwhelming majority of the government's contracting partners, as the Energy Policy Act's special assessment concededly does, *see* Pet. App. 29a, is simply *not* a "public and general" act. The narrowness of the law means, in turn, that the government cannot claim either that the additional cost burdens imposed on its contracting partners are an "incidental" effect of the statute or that, in the absence of an unmistakable promise to the contrary, the parties must have contemplated this possible exercise of governmental power. Further review is therefore warranted to address these important issues, as well as the similarly compelling due process question presented by the Federal Circuit's holding that the 30-year retroactive cost-shifting effected by this statutory assessment is justified *solely* by utilities' prior purchase of government enrichment services.

1. The government first contends that review is unnecessary because the contracts between Petitioner Yankee and the government have already been fully performed, and therefore this case involves no remaining contract-based claims. (Gov't Opp. at 7-8.) But the fact that the government has already provided the contractual enrichment services does not end the contract analysis. The critical point here is that Yankee also has fully performed—it has already paid the contractually-specified fixed prices. That prior full payment by Yankee is *precisely* what now prevents the government from collecting "more price" from Yankee. The government's attempt to shift its costs onto Yankee, in spite of Yankee's prior full payment, violates the contractual fixed-price terms. *See United States v. Spearin*, 248 U.S. 132, 136 (1918) ("Where one [by contract] agrees to do, for a fixed sum, a thing possible to be performed, he will not

. . . become entitled to additional compensation because unforeseen difficulties are encountered."); *Puerto Rico v. Russell & Co.*, 315 U.S. 610, 619 (1942) (statutory special assessment imposed on prior contractors with government "was not a general tax" but rather "a clear violation of the obligation of the contracts").[1]

It seems clear, therefore, that the government would have had no lawful basis for simply insisting that purchasers of enrichment services pay more than the contractually-specified prices to defray the government's additional costs. It is only the power of the government to act unilaterally by legislation that puts its contracting partners in the position of being compelled to pay again. Whether that exercise of power is consistent with the government's prior contractual dealings turns—as all the judges below acknowledged—on the applicability of the sovereign acts and unmistakability doctrines. And it is the serious distortion of those doctrines by the panel majority below that requires further review.

2. The government asserts that the Federal Circuit "correctly" applied the sovereign acts and unmistakability doctrines. (Gov't Opp. at 8-9.) But the government's treatment of these doctrines is wholly conclusory, and fails to confront the serious and troubling issues raised in Yankee's petition. Ultimately, the government's discussion of sovereign acts and unmistakability reflects the same

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[1] If the government had instituted a tax enforcement action, and Yankee had defended by asserting prior payment under its fixed-price contracts, the government could not plausibly deny that the case involved contract-based claims. That this action was instituted by Yankee, not the government, cannot prevent the very same contract-based rights from being asserted—and recognized—here. The cases cited by the government, and mentioned by the dissent below, are not to the contrary. *See John J. Kirlin, Inc. v. United States*, 827 F.2d 1538 (Fed. Cir. 1987) (applying clause in contract requiring action prior to contract completion); *Mulholland v. United States*, 361 F.2d 237 (Ct. Cl. 1966) (involving statute of limitations accrual date).

profound confusion that is evident in the decision below, thus underscoring the need—and the opportunity this case presents—to clarify and reconfirm the principles set forth by the Court in *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996).[2]

a. With respect to the sovereign acts doctrine, as stated above the government cannot (and does not) defend the Federal Circuit's holding that a statute whose impact falls predominantly (at least 85%) on the government's contracting partners is nevertheless the kind of "public and general" act for which the government is immune from contract liability. Nor does the government address, let alone refute, Yankee's showing in the petition, (Pet. at 13), that the Federal Circuit's holding in this regard conflicts with decisions of this Court that predate *Winstar*. The government does suggest, though it fails to state directly, that the Federal Circuit's treatment of the sovereign acts doctrine is consistent with *Winstar*. In support the government suggests, again only implicitly, that application of the sovereign acts doctrine turns on congressional purpose. The government thus asserts that there is no evidence, in this case, that "Congress intended to alter the terms of petitioner's contracts." (Gov't Opp. at 9.)

Congressional purpose, however, is not only the wrong issue here, as Yankee explained in the petition, (Pet. at 10), it is also a false issue. Yankee *acknowledges* that the purpose of the special assessment is to obtain funds to clean up the government's enrichment plants, and further acknowledges that this is a laudable undertaking. But those conclusions are not inconsistent with the fact

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[2] For further discussion of the numerous inconsistencies between this Court's decision in *Winstar* and the Federal Circuit's decision below, *see* Brief as Amicus Curiae of the Committee on Energy of the Association of the Bar of the City of New York in Support of Petitioner *and* Brief Amicus Curiae of the National Defense Industrial Association in Support of Petitioner.

that the effect of the special assessment is to impose added burdens *predominantly* on the government's contracting partners. It is this latter fact that makes the assessment a non-general governmental act and precludes application of the sovereign acts defense—regardless of Congress' reasons for acting. (*See also* Pet. at 11-12) (explaining that application of sovereign acts defense in this case is inconsistent both with Justice Souter's "substantial impact" analysis set forth in the principal *Winstar* opinion and with the approach articulated by Justice Scalia for the concurring Justices).[3] Although the government (and the Federal Circuit) seek to separate the government's contractual and sovereign capacities, "the Government's capacities must be treated as fused when the Government acts in a non-general way." *Winstar*, 116 S. Ct. at 2467 (plurality opinion).

b. The government's treatment of the unmistakability doctrine is likewise misdirected. The government simply repeats the uncontested fact that Yankee's contracts contain no unmistakable waiver of Congress' authority to impose the special assessment. (Gov't Opp. at 10.) But as Yankee also explained in the petition, (Pet. at 13-14), unmistakable contract language is only necessary to protect government contractors against "public and general" sovereign acts. Because the special assessment here is *not* such a general sovereign act, but rather is targeted legislation that predominately affects the government's contract-

[3] Moreover, even the government must concede that Congress had multiple purposes for imposing the special assessment on past enrichment customers. Most obviously, the government sought to shift the D&D cleanup costs away from the government's new enrichment corporation. *See* Kristi Bahrenburg, *Government's Uranium Company Is Set To Take Big Step Toward Privatization*, Wall St. J., Jan. 16, 1998, § B, at 2 ("President Clinton's 1998 fiscal year budget puts expected revenue from the sale at $1.6 billion—considered a conservative estimate"). For a more extensive discussion of the logic flaws inherent in the government's (and the Federal Circuit's) focus on legislative purpose, *see* Brief of Amicus Curiae Washington Legal Foundation in Support of Petitioner at 8-12.

ing partners, the fixed-price terms of Yankee's contracts provide ample protection against the government's narrowly-focused effort to collect more price. The government's insistence on additional contract language is nothing more than a demand for a double promise, which the Court rejected in *Winstar*. *See* 116 S. Ct. at 2461 (plurality opinion); *id.* at 2478 (Scalia, J., concurring in the judgment).

c. The separate discussion of the sovereign acts doctrine and the unmistakability doctrine in the government's opposition brief makes clear that the government's confusion about these doctrines, like the Federal Circuit's confusion, springs from a failure to appreciate the relationship between them. To be sure, that relationship, which Yankee discussed in the petition, (Pet. at 11-14), is arguably obscured by the need to consult several opinions in *Winstar*. But as one commentator also recently observed, there is "substantial overlap and agreement . . . between Justice Scalia's exegesis of the unmistakability doctrine and Justice Souter's analysis of the sovereign acts doctrine" and "the key element of an approach likely to command majority support is . . . the level of generality of the governmental action that interferes with the promised performance." Joshua I. Schwartz, *Assembling Winstar: Triumph of the Idea of Congruence in Government Contracts Law?*, 26 Pub. Cont. L.J. 481, 554, 556 (1997).

This case squarely presents a question concerning the importance, in cases of this type, of the "level of generality" of the government's post-contractual actions. This case therefore provides a compelling and timely opportunity for the Court to examine, and articulate, the extent to which that factor controls the meaning of *both* the sovereign acts and the unmistakability doctrines. *See id.* at 557 ("It is inconceivable that there should be two sets of rules, operating independently of one another, to govern this vital question.").

3. The government's contention that Yankee's due process claim is not properly before this Court because Yankee "did not . . . press" the claim below, (Gov't. Opp. at 11), is also wrong, and is especially puzzling given that an entire section of Yankee's brief to the Federal Circuit was devoted to the due process issues. That section of Yankee's appellate brief was entitled "The Judgment Below, Rejecting The Government's Imposition Of The Retroactive Per-Unit Special Assessment On Yankee, Should Also Be Affirmed As A Fifth Amendment Due Process Clause Violation." Brief for Plaintiff/Cross-Appellant Yankee Atomic Electric Company at 38 (Nos. 96-5021, -5025). In text, this section of Yankee's brief below maintained that "Congress was 'without power' to . . . impos[e] the government's additional performance costs for D&D" on previous enrichment customers like Yankee. *Id.* at 39. In support of this due process argument below, Yankee mentioned both the "retroactivity" point and the "lack of requisite nexus" point articulated in Yankee's petition here. *Id.* at 39-40. The government's jurisdictional objection is, therefore, completely without merit.

On the substance of the due process issue, the government's opposition brief is again entirely conclusory. The government asserts that "Congress rationally concluded that the cost of decontaminating and decommissioning the uranium enrichment plants . . . should be shared by all of the participants in the relevant market." (Gov't Opp. at 12.) But this merely begs the relevant question of whether it *was* rational—in due process terms—for Congress to impose the 30-year retroactive special assessment based on nothing more than the utilities' prior *purchase* of government enrichment services. That is precisely the question posed in this case, and Yankee has shown that it is a substantial and important question, (Pet. at 16-19). Indeed, the Court already has before it the related question of due process retroactivity posed in *Eastern Enterprises v. Appel, cert. granted*, 118 S. Ct. 334 (1997)

(No. 97-42). Here again, the government offers no real response to Yankee's arguments.

4. The government raises two additional, miscellaneous points that warrant only brief reply. First, the government suggests that during the course of legislative debate over the Energy Policy Act, a utility trade group acquiesced in the special assessment. (Gov't Opp. at 2, 13.) But the fact that utilities may have expressed a preference for one, rather than another, method for financing the clean-up does not, and should not, prevent Yankee (or any other utility) from raising legitimate constitutional and other legal objections to the statute as enacted. To the extent utilities "accepted" the billions of dollars shifted onto them by the special assessment, the likelihood is they did so not because they desired the added liability but only because the assessment was the least objectionable of the available legislative possibilities.[4]

Second, the government points out that the Energy Policy Act imposes upon it a significant share of the D&D liability, and suggests that this somehow blunts the force of Yankee's arguments. (Gov't Opp. at 2-3, 12-13.) But this argument is a *non-sequitur*: an improper shifting of costs cannot be justified by saying that the challenged law might have shifted even more costs.[5] Moreover, the

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[4] Moreover, contrary to the government's suggestion that Yankee was one of the utilities that "accepted" the statutory special assessment, (Gov't Opp. at 2), in fact Yankee itself vigorously objected to the retroactive assessment.

[5] The government is also wrong to assert that "[p]ursuant to the Act, the government pays more than 68% of the total decontamination and decommissioning expense." (Gov't Opp. at 13.) The 68% figure assumes the maximum possible government appropriation under the Energy Policy Act, but as Yankee has explained, (Pet. at 4 n.2), actual appropriations have typically been well below the authorized maximum.

historical record is clear that the government's enrichment plants were already fully contaminated from nuclear weapons production activity prior to the commencement of commercial fuel enrichment operations. As the Department of Energy ("DOE") testified to Congress in 1992, "contamination . . . occurred during that 20-year period" when "the plants were operated . . . by the government exclusively for military purposes."[6] DOE's outside consultant likewise reported that "when commercial production began, the diffusion plants were already contaminated and the need to conduct D&D was well established."[7] That fact makes it even more inappropriate for the government now to shift to its contractual partners costs that it assumed under the fixed-price contracts and should properly bear.[8]

* * * *

For the foregoing reasons, and the reasons set forth in Yankee's petition for a writ of certiorari, the petition should be granted (or, if the Court elects not to grant plenary review in this case, Yankee's petition should be held pending the Court's disposition of *Eastern Enterprises v. Appel*, No. 97-42, (*see* Pet. at 17-18, 21 n.17)).

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[6] *Department of Energy Budget Request for Fiscal Year 1993: Oversight Hearing Before the Subcomm. on Energy and the Env't of the House Comm. on Interior and Insular Affairs*, 102nd Cong. 79 (1992) (Statement of William H. Young, Assistant Secretary for Nuclear Energy, U.S. Dep't of Energy).

[7] Martin Marietta Energy Sys., Inc., *Technical Information for Assessing Cost Responsibility for Decontamination and Decommissioning of the Gaseous Diffusion Plants* 6 (1992).

[8] For further discussion of the government's longstanding awareness of the D&D problem, and of the commercial impact of the special assessment on the deregulating utility industry, *see* Brief in Support of Petitioner Filed by Thirty-One Electric Utilities as Amici Curiae.

Respectfully submitted,

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